PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration, intervener)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08(i)-394–07 OF 2018(W)

RAMLY ALI, AZAHAR MOHAMED, ROHANA YUSUF, TENGKU MAIMUN AND NALLINI PATHMANATHAN FCJJ

23 APRIL 2019

Civil Procedure — Contempt of court — Scandalising the court — Lawyer issued press release stating Federal Court's expungement of several paragraphs of a Court of Appeal's dissenting judgment was highly irregular — Lawyer stated in article that he lodged report with Malaysian Anti-Corruption Commission to investigate 'irregularities' in the court's proceedings — Whether it was proven beyond reasonable doubt that lawyer's statements were calculated to erode public confidence in the Federal Court, the administration of justice and the Judiciary — Whether lawyer's statements were not fair criticism because no cogent and rational basis was shown for the making of the statements — Whether impugned statements made without verifying circumstances behind the application for the expungement and what actually took place at the Federal court hearing — Whether in imposing custodial sentence to reflect gravity of the contempt court took into account fact that lawyer failed to unreservedly apologise despite specific query from the court

Civil Procedure — Contempt of court — Mens rea — Contempt of scandalising the court — Whether Malaysia did not need to adopt mens rea test requiring prosecution to prove alleged contemnor's intention to interfere with the administration of justice — Whether such test not suitable for local context — Whether such test too stringent as it entailed inquiry into inner workings of the alleged contemnor's mind — Whether there was no good reason to depart from Malaysian common law practice of requiring prosecution to establish whether there was intentional publication of material scandalising the court — Whether impugned statements had effect of undermining public confidence in the administration of justice depended on the impression they made on 'the ordinary reasonable reader of average intelligence'

The instant judgment concerned an application by the attorney general ('AG') for an order of committal for contempt against an advocate and solicitor ('Arun Kasi') for scandalising the Federal Court and the Judiciary. PCP Construction Sdn Bhd ('PCP') and Leap Modulation Sdn Bhd ('Leap Modulation') were involved in a suit before the High Court over a claim for monies under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

PCP had appealed to the Court of Appeal ('the COA') against the High Court's decision. The majority of the COA dismissed the appeal but the dissenting judge, in about 17 paragraphs of his judgment ('the offending paragraphs'), made certain detrimental pronouncements against the Asian International Arbitration Centre ('the AIAC') even though it was never a party to the litigation nor mentioned in the pleadings of the parties. The dissenting judgment had, inter alia, called for a copy of the judgment to be forwarded to the Malaysian Anti-Corruption Commission ('MACC') and the Inspector-General of Police ('IGP') so that they could study the remarks made therein against the KLRCA (the former name of the AIAC) and investigate and take the necessary action. When PCP applied for leave to appeal ('the leave application') to the Federal Court against the majority COA's decision, AIAC, aggrieved by the comments made against it in the dissenting judgment, applied to intervene in the leave application and have the offending paragraphs expunged from the record. A three-member panel of the Federal Court allowed AIAC's intervention and expungement applications when all parties present, including PCP and Leap Modulation, indicated that they had no objections to the orders being made. In a press release to Aliran, Arun Kasi made various remarks about the decision which appeared in two articles on Aliran's website. In the articles, Arun Kasi said he had, in the public interest, lodged a report with the MACC to investigate 'serious anomalies' in the Federal Court's decision to expunge the offending paragraphs including that: (a) it had been done without AIAC filing a formal appeal to the Federal Court; (b) the decision resembled 'a sort of exparte or unilateral order'; (c) no grounds for the expungement were given by the court; (d) the 'right parties' were not before the court, especially the AG, who, as guardian of the public interest, should have been heard before the expungement order was granted; (e) a panel of only three judges had heard the application when a bigger coram would have been appropriate; and (f) it was 'most strange' that even the dissenting judge's direction to the MACC and the IGP to investigate had also been expunged from the record. The AG submitted that Arun Kasi's statements and allegations went beyond the bounds of fair criticism and by insinuating that the judges who heard and determined AIAC's applications were guilty of misconduct and corrupt, Arun Kasi had scandalised the court beyond reasonable doubt. In his defence, Arun Kasi said that in his press release to Aliran, he had attached an appendix setting out the facts on AIAC as well as the expunged dissenting judgment and the manner in which the articles subsequently appeared on Aliran's website was decided entirely by Aliran. He denied that he intended to scandalise the Judiciary or cause the three judges who decided AIAC's applications to be investigated by the MACC because the target of his attack was the AIAC and its role in formulating the CIPAA. Arun Kasi said he was intent on reforming the adjudication scheme under the CIPAA in the public interest. He expressed regret, but not an unreserved apology, if his statements were taken to have scandalised the Judiciary. Arun Kasi maintained that the manner in which the expungement order was granted was irregular.

Held, unanimously finding Arun Kasi guilty of contempt and sentencing him to 30 days' jail and a fine of RM40,000 in default 30 days' jail:

(1) On weighing the competing evidence and submissions as to whether the impugned statements were fair criticism or amounted to scandalising contempt, the court was satisfied beyond reasonable doubt that Arun Kasi's statements were calculated to erode public confidence in the administration of justice and the Judiciary. The court was not persuaded that Arun Kasi's articles were authored in the public interest. It was clear that the authority of the law as administered by the courts was flouted (see paras 119 & 123).

(2) While he expressed regret if his statements had undermined public confidence in the Judiciary, Arun Kasi did not tender an unreserved apology despite specific query from the court. The gravity of the offence committed coupled with his refusal to tender an unreserved apology justified the court taking a serious view of the matter and handing down a sentence that reflected the seriousness of the offence. Arun Kasi's contemptuous statements tarnished the good name of the Judiciary as a whole, undermined public confidence in the Judiciary and ridiculed, scandalised and offended the dignity, integrity and impartiality of the court. As an advocate and solicitor and officer of the court, Arun Kasi was expected to uphold the dignity of the court, act in a responsible manner and not breach the law (see paras 120 & 124–128).

(3) The mens rea test under Malaysian common law to determine liability for the offence of scandalising contempt was the objective test, ie, whether the publication was intentional and not whether there was intention to interfere with the administration of justice. In conducting the objective inquiry, the court had to assess whether the impugned statements would undermine public confidence in the administration of justice based on its effect on the ordinary reasonable reader of average intelligence. The impugned statements in the instant case would have given such a reader the impression that there was corruption in the conduct of the *PCP-Leap Modulation* case; that the Federal Court's expunction of portions of the dissenting judgment was improper, in breach of substantive and procedural law and corrupt. Taken in its entirety, Arun Kasi's statements were clearly directed at the Federal Court and the Judiciary as a whole (see paras 55, 58, 63 & 83–88).

(4) With regard to the 'Five Anomalies' cited by Arun Kasi: (a) AIAC could not have challenged the offending paragraphs by way of appeal because it was never a party in the *PCP-Leap Modulation* case; there was nothing irregular or objectionable in the Federal Court granting the orders sought by the AIAC — in fact, there was ample authority to do so; (b) the *PCP-Leap Modulation* case was a private litigation over monies and not public interest litigation warranting the involvement of the AG. AIAC

was entirely at liberty to apply for the expunction as it was never given a right of hearing before the offending paragraphs were made. All concerned parties were before the Federal Court when the orders were made; (c) applications for leave and any such ancillary applications were routinely heard by a panel of three judges; hence there was no 'irregularity' in the three-member panel hearing AIAC's applications; (d) grounds of judgment were not handed down by the Federal Court on every application that it heard, more so when the application was uncontested; hence there was nothing sinister about there being no grounds for the decision in the instant case; and (e) the expunction did not mean the Federal Court had precluded anyone from lodging a complaint with the relevant authorities. Any party intending to make a report with the MACC could proceed to do so despite the expunction (see paras 90–99).

(5) Arun Kasi's allegations were not made in good faith nor did they amount to fair criticism. There was no material in his affidavits or in his oral testimony to substantiate a plea of fair criticism. His allegations were unfounded and ambiguous and so grave that it was necessary for him to provide a highly cogent and rational basis for so writing. But a reading of the impugned statements provided no particulars of the need to report to the MACC, how any such conduct was corrupt, nor any particulars of complicity in the granting of the orders. Arun Kasi made the impugned statements without verifying or ascertaining the true facts relating to the expunction proceedings. He did not have the notes of proceedings but only the order of the Federal Court. He did not concern himself with the accuracy of the statements he chose to have published (see paras 107, 110–111 & 113–114).

(6) Adopting a mens rea test which required the prosecution to prove an intention to interfere with the administration of justice needed proof of the subjective intention of the alleged contemnor to so interfere. This was difficult to establish because it entailed an inquiry into the inner workings of the alleged contemnor's mind. Such a stringent mens rea test was not suitable in the local context. There was no reason to depart from the position under Malaysian common law where the prosecution only needed to establish that the impugned publication was intentional (see paras 63, 67 & 70).

[Bahasa Malaysia summary

Penghakiman ini melibatkan permohonan oleh Peguam Negara ('PN') untuk perintah komital atas dasar menghina terhadap seorang peguambela dan peguamcara ('Arun Kasi') kerana memburuk-burukkan Mahkamah Persekutuan dan badan kehakiman. PCP Construction Sdn Bhd dan Leap Modulation Sdn Bhd ('Leap Modulation') terlibat dalam guaman di Mahkamah Tinggi berhubung tuntutan wang di bawah Akta Pembayaran dan

A Adjudikasi Industri Pembinaan 2012 ('Akta'). PCP telah merayu kepada Mahkamah Rayuan ('MR') terhadap keputusan Mahkamah Tinggi. Majoriti MR menolak rayuan tersebut tetapi hakim yang menentang, dalam kira-kira perenggan 17 penghakimannya ('perenggan yang menyinggung'), membuat pengumuman tertentu yang memudaratkan terhadap Pusat Timbang Tara B Antarabangsa Asia ('AIAC') walaupun tidak pernah menjadi pihak kepada litigasi dan tidak disebutkan dalam permohonan pihak-pihak. Penghakiman yang menentang telah, antara lain, meminta salinan penghakiman tersebut dihantar kepada Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') dan Ketua Polis Negara ('KPN') supaya mereka dapat mengkaji kenyataan yang C dibuat di dalamnya terhadap KLRCA (nama sebelum AIAC) dan menyiasat dan mengambil tindakan yang perlu. Apabila PCP memohon kebenaran untuk merayu ('permohonan kebenaran') kepada Mahkamah Persekutuan terhadap keputusan majoriti MR, AIAC, yang terkilan dengan komen-komen yang dibuat terhadapnya dalam penghakiman yang menentang, memohon D untuk campur tangan dalam permohonan kebenaran dan mempunyai perenggan yang menyinggung dibuang daripada rekod. Panel tiga ahli Mahkamah Persekutuan membenarkan permohonan campur tangan dan pembatalan AIAC apabila semua pihak hadir, termasuk PCP dan Leap Modulation, menunjukkan bahawa mereka tidak mempunyai bantahan E terhadap perintah yang dibuat. Dalam siaran akhbar kepada Aliran, Arun Kasi membuat pelbagai ulasan mengenai keputusan yang muncul dalam dua artikel di laman web Aliran. Dalam artikel tersebut, Arun Kasi berkata, beliau telah, dengan kepentingan awam, membuat laporan dengan SPRM untuk menyiasat 'anomali serius' dalam keputusan Mahkamah Persekutuan untuk F mengosongkan perenggan yang menyinggung termasuk: (a) ia telah dilakukan tanpa AIAC memfailkan rayuan rasmi kepada Mahkamah Persekutuan; (b) keputusan tersebut menyerupai 'seperti perintah exparte atau unilateral'; (c) tiada alasan untuk pembatalan tersebut diberikan oleh mahkamah; (d) 'pihak yang benar' tidak berada di hadapan mahkamah, terutama PN, yang, G sebagai penjaga kepentingan awam, sepatutnya telah didengar sebelum perintah pembatalan tersebut diberikan; (e) hanya panel tiga hakim telah mendengar permohonan tersebut apabila satu korum yang lebih besar lebih sesuai; dan (f) adalah 'sangat pelik' bahawa walaupun arahan hakim yang menentang kepada SPRM dan KPN untuk menyiasat juga telah dihapuskan H dari rekod. Peguam Negara menyampaikan bahawa kenyataan dan tuduhan Arun Kasi melampaui batas kritikan yang adil dan dengan menghasut bahawa hakim yang mendengar dan menentukan permohonan AIAC bersalah atas salah laku dan rasuah, Arun Kasi telah memburuk-burukkan mahkamah melampaui keraguan munasabah. Dalam pembelaannya, Arun Kasi berkata I dalam siaran akhbarnya kepada Aliran, beliau telah melampirkan lampiran yang membentangkan fakta-fakta mengenai AIAC serta penghakiman yang ditolak dan cara yang mana artikel-artikel yang kemudiannya muncul di laman web Aliran telah diputuskan sepenuhnya oleh Aliran. Beliau menafikan bahawa dia berhasrat memburuk-burukkan kehakiman atau menyebabkan

tiga hakim yang memutuskan permohonan AIAC untuk disiasat oleh SPRM kerana sasaran serangannya adalah AIAC dan peranannya dalam merumuskan Akta. Arun Kasi berkata beliau berniat untuk mereformasi skim adjudikasi di bawah Akta demi kepentingan awam. Beliau melahirkan rasa kesal, tetapi tidak meminta maaf sepenuhnya, jika kenyataannya diambil untuk memburuk-burukkan kehakiman. Arun Kasi berpendapat bahawa cara pemberian perintah pembatalan tersebut tidak teratur.

Diputuskan, sebulat suara mendapati Arun Kasi bersalah menghina dan menjatuhkan hukuman penjara 30 hari dan denda RM40,000 penjara jika gagal 30 hari:

(1) Dengan menimbang keterangan dan hujahan tentang sama ada kenyataan yang dipersoalkan adalah kritikan yang adil atau memburuk-burukkan, mahkamah berpuas hati dengan keraguan yang munasabah bahawa kenyataan Arun Kasi dikira untuk menghakis keyakinan orang ramai terhadap pentadbiran keadilan dan kehakiman. Mahkamah tidak diyakinkan bahawa artikel-artikel Arun Kasi telah dikarang demi kepentingan awam. Jelas sekali bahawa kewibawaan undang-undang seperti yang dikendalikan oleh mahkamah telah dirosakkan (lihat perenggan 119 & 123).

(2) Walaupun beliau menyesal jika kenyataannya telah menjejaskan keyakinan orang ramai terhadap badan kehakiman, Arun Kasi tidak memohon maaf sepenuhnya walaupun atas permintaan khusus daripada mahkamah. Keberatan kesalahan yang dilakukan bersama dengan keengganannya untuk memohon maaf sepenuhnya mewajarkan mahkamah mengambil pandangan yang serius mengenai perkara tersebut dan menyerahkan satu hukuman yang mencerminkan keseriusan kesalahan tersebut. Kenyataan menghina Arun Kasi mencemarkan nama baik badan kehakiman secara keseluruhannya, menjejaskan keyakinan orang ramai terhadap badan kehakiman dan menghina, memburuk-burukkan dan menyinggung maruah, integriti dan kesaksamaan mahkamah. Sebagai peguambela dan peguamcara dan pegawai mahkamah, Arun Kasi dijangka menegakkan maruah mahkamah, bertindak secara bertanggungjawab dan tidak melanggar undang-undang (lihat perenggan 120 & 124–128).

(3) Ujian mens rea di bawah undang-undang umum Malaysia untuk menentukan liabiliti bagi kesalahan menghina adalah ujian objektif, iaitu, sama ada penerbitan tersebut disengajakan dan bukan sama ada terdapat hasrat untuk mengganggu pentadbiran keadilan. Dalam menjalankan siasatan objektif, mahkamah perlu menilai sama ada penyataan yang dipersoalkan akan menjejaskan keyakinan orang ramai dalam pentadbiran keadilan berdasarkan kesannya kepada pembaca munasabah biasa dengan intelek sederhana. Kenyataan yang

dipersoalkan dalam kes ini akan memberikan pembaca bahawa terdapat rasuah dalam menjalankan kes *PCP-Leap Modulation*; bahawa pemadaman Mahkamah Persekutuan mengenai bahagian penghakiman yang tidak sepatutnya adalah tidak wajar, melanggar undang-undang substantif dan prosedur dan rasuah. Secara keseluruhannya, kenyataan Arun Kasi jelas diarahkan ke Mahkamah Persekutuan dan badan kehakiman secara keseluruhannya (lihat perenggan 55, 58, 63 & 83–88).

(4) Berkenaan dengan 'Lima Anomali' yang disebut oleh Arun Kasi: (a) AIAC tidak mungkin mencabar perenggan yang menyinggung dengan cara rayuan kerana ia tidak pernah menjadi pihak dalam kes *PCP-Leap Modulation*; tiada yang tidak teratur atau tidak boleh diterima di Mahkamah Persekutuan yang memberikan perintah yang dipohon oleh AIAC — sebenarnya, terdapat kuasa yang mencukupi untuk berbuat demikian; (b) kes *PCP-Leap Modulation* adalah litigasi persendirian berkenaan wang dan bukan litigasi kepentingan awam yang menjamin penglibatan PN. AIAC adalah bebas sepenuhnya untuk memohon pemadaman tersebut kerana ia tidak pernah diberikan hak pendengaran sebelum perenggan yang menyinggung dibuat. Semua pihak yang berkaitan berada di hadapan Mahkamah Persekutuan apabila perintah tersebut dibuat; (c) permohonan untuk kebenaran dan apa-apa permohonan sampingan sedemikian didengar oleh panel tiga hakim; justeru tiada 'ketidaksamaan' dalam pendengaran permohonan tiga anggota panel AIAC; (d) alasan penghakiman tidak diserahkan oleh Mahkamah Persekutuan atas setiap permohonan yang didengarnya, lebih-lebih lagi apabila permohonan itu tidak dibantah; oleh itu, tiada apa-apa yang mencurigakan kerana tidak ada alasan bagi keputusan dalam kes tersebut; (e) pemadaman tidak bermakna Mahkamah Persekutuan menghalang sesiapa daripada membuat aduan dengan pihak berkuasa yang berkenaan. Mana-mana pihak yang bercadang untuk membuat laporan dengan SPRM boleh terus berbuat demikian walaupun terdapat pemadaman (lihat perenggan 90–99).

(5) Tuduhan Arun Kasi tidak dibuat dengan niat baik dan tidak berjumlah kritikan yang adil. Tiada material dalam afidavitnya atau dalam testimoni lisannya untuk membuktikan pengakuan kritikan yang adil. Tuduhan-tuduhannya tidak berdasar dan tidak jelas dan sangat serius sehingga perlu bagi beliau untuk memberikan asas yang sangat meyakinkan dan rasional untuk menulis begitu. Tetapi pembacaan kenyataan-kenyataan yang diberikan tidak memberi butir-butir tentang keperluan untuk melaporkan kepada SPRM, bagaimana kelakuan sedemikian rasuah, atau apa-apa butiran mengenai masalah dalam pemberian perintah tersebut. Arun Kasi membuat kenyataan-kenyataan yang tidak bertanggungjawab tanpa mengesahkan atau menegaskan fakta sebenar yang berkaitan dengan prosiding pemadaman. Beliau tidak mempunyai nota prosiding tetapi hanya perintah Mahkamah

Persekutuan. Beliau tidak melibatkan dirinya dengan ketepatan kenyataan yang dipilihnya untuk diterbitkan (lihat perenggan 107, 110–111 & 113–114).

(6) Mengguna pakai ujian mens rea yang mengharuskan pihak pendakwaan membuktikan niat untuk mengganggu pentadbiran keadilan yang memerlukan bukti niat subjektif dari penuduh yang dikatakan untuk campur tangan. Ini adalah sukar untuk dibuktikan kerana ia melibatkan siasatan ke dalam kerja dalaman fikiran penuduh yang dikatakan. Ujian mens rea yang ketat itu tidak sesuai dalam konteks setempat. Tiada alasan untuk berlepas dari kedudukan di bawah undang-undang umum Malaysia di mana pihak pendakwaan hanya perlu membuktikan bahawa penerbitan yang dipersoalkan tersebut disengajakan (lihat perenggan 63, 67 & 70).]

Notes

For cases on scandalising the court, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2603–2609.

For a case on mens rea, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2552.

Cases referred to

Attorney General & Ors v Arthur Lee Meng Kuang [1987] 1 MLJ 206, SC (refd)

Attorney General v Times Newspapers Ltd [1973] 3 All ER 54; [1974] AC 273, HL (refd)

Attorney-General v Tan Liang Joo John and others [2009] SGHC 41, HC (refd)

Au Wai Pang v Attorney-General [2016] 1 SLR 992; [2015] SGCA 61, CA (refd)

Balogh v Crown Court at St Albans [1974] 3 All ER 283; [1975] QB 73, CA (refd)

Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240, HC (refd)

Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696, HL (refd)

Dhooharika v Director of Public Prosecutions (Commonwealth Lawyers' Association intervening) [2015] AC 875, PC (not folld)

Lim Kit Siang v Dato Seri Dr Mahathir Mohamad [1987] 1 MLJ 383, SC (refd)

McLeod v St Aubyn [1899] AC 549, PC (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)

Murray Hiebert v Chandra Sri Ram [1999] 4 MLJ 321, CA (refd)

PP v SRN Palaniappan & 2 Others [1949] 1 MLJ 246 (refd)

R v Duffy and Others, Ex parte Nash [1960] 2 QB 188 (refd)

R v Metropolitan Police Commissioner, ex parte Blackburn (No 2) [1968] 2 WLR 1204, CA (refd)

Rex v White (1808) 1 Camp 359 (refd)
Shadrake Alan v Attorney-General [2011] 3 SLR 778; [2011] SGCA 26, CA (refd)
Solicitor-General v Radio Avon Ltd and Another [1978] 1 NZLR 225, CA (refd)
Tommy Thomas v Peguam Negara, Malaysia and other appeals [2001] MLJU 767; [2001] 3 CLJ 457, CA (refd)
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and another application [1990] 1 MLJ 273, SC (refd)
Zainur bin Zakaria v PP [2001] 3 MLJ 604, FC (refd)

Legislation referred to

Civil Law Act 1956 s 3
Construction Industry Payment and Adjudication Act 2012
Courts of Judicature Act 1964 s 13
Crime and Courts Act 2013 [UK] s 33
Federal Constitution arts 10, 126, 145, 145(3)
Rules of Court 2012 O 52

Tommy Thomas (Amarjeet Singh a/l Serjit Singh, Alice Loke Yee Ching and Suzana Atan with him) for the appellant.
Bastian Vendargon (Haniff Khatri, S Chandran and Joy Appukuthan with him) (S Chandran & Partners) for the respondent.

Ramly Ali, Azahar Mohamed, Rohana Yusuf, Tengku Maimun and Nallini Pathmanathan FCJJ:

INTRODUCTION

[1] This is our judgment in respect of the honourable attorney general's application dated 28 February 2019, seeking an order of committal against Arunachalam Kasi ('Arun Kasi') for contempt of court, more particularly, scandalising contempt.

[2] The grounds upon which this application was made was that Arun Kasi had scandalised the Federal Court of Malaysia by making various allegations regarding judicial conduct in the hearing, disposal and adjudication of a civil application before the Federal Court on 7 November 2018 in two articles published online by a news portal known as Aliran.

[3] The thrust of the attorney general's originating summons is that Arun Kasi's statements in these two articles insinuate that the Federal Court judges who heard and allowed the application to expunge portions of the dissenting judgment were guilty of misconduct, involved in corrupt activity and had compromised their integrity, to the extent that an investigation by the Malaysian Anti-Corruption Commission ('MACC') was warranted. The

MACC is a statutory body established to investigate into offences of corruption. These insinuations were made in both the articles published by Aliran.

[4] As a consequence of these allegations the attorney general, as the guardian of the rule of law, brought this application, not to protect the dignity of the individual judges concerned, but to protect public confidence in the administration of justice in Malaysia. Put another way, the publications comprising substantively, if not wholly of Arun Kasi's allegations, were calculated to impair the confidence of the people in the court's judgments and thereby the administration of justice as a whole.

SALIENT BACKGROUND FACTS

[5] It is undisputed that Arun Kasi sent a press release to an online news portal known as Aliran. As a consequence of his sending this press release, two articles were published online on Aliran's website on the 16 of February 2019 and 22 February 2019 respectively. The two articles are entitled:

(a) 'How a dissenting judgment sparked a major judicial crisis'; and

(b) 'Tommy Thomas must look into arbitration centre that sparked judicial crisis'.

[6] The substantive, if not the whole, of the content of these articles emanates from the press release furnished by Arun Kasi.

[7] More specifically, these articles contain allegations pertaining to judicial conduct in the hearing, disposal and decision of the Federal Court in relation to an application for the expunction of parts of a dissenting judgment by Justice Hamid Sultan Abu Backer, judge of the Court of Appeal, in the case of *Federal Court Civil Application No 08(i)-394– 07 of 2018(W) PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener)* ('Leap Modulation'). It is apparent from a reading of the two articles that the '*Leap Modulation* case' referred to by Arun Kasi in both articles is a reference to the said civil application.

[8] Leave for an order for committal for contempt was granted by this court on an exparte basis 28 February 2019. On 13 March 2019 this court dismissed an application by the respondent to set aside the exparte leave for committal. The substantive motion for committal was heard and disposed of on 28 March 2019. Prior to hearing the substantive motion, the court heard and dismissed Arun Kasi's application to cross-examine the attorney general on his affidavit affirmed in support of the substantive motion.

A EVENTS LEADING TO THE APPLICATION TO EXPUNGE IN LEAP MODULATION

How AIAC was drawn into private litigation between two other parties

B **[9]** The civil appeal in *Leap Modulation* concerns a dispute between two private litigants relating to a claim for monies under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The two litigants are PCP Construction Sdn Bhd ('PCP') and Leap Modulation Sdn Bhd. After the hearing of the civil appeal in the Court of Appeal, the appeal was, by majority, C dismissed. Justice Hamid Sultan Abu Backer handed down a dissenting judgment, allowing the appeal. In the course of his dissenting judgment, certain detrimental pronouncements were made against the Asian International Arbitration Centre ('AIAC'). However AIAC was never a party to this litigation at that juncture, either in the High Court or in the Court of D Appeal.

[10] PCP Construction Sdn Bhd, the party that lost the appeal in the Court of Appeal, sought leave to appeal against the majority decision from the Federal E Court vide *Federal Court Civil Application No 08(i)-394–07 of 2018(W)* (where the present contempt proceedings are also brought).

[11] AIAC, not being a party to the proceedings thus far, but aggrieved by the statements made against it, sought to intervene in the application for leave F to appeal by PCP. This was the only way in which AIAC could participate in the matter so as to be heard on its application to expunge parts of the judgment that were adverse to it. It will be recalled that as a non-party, AIAC had never been heard in the civil appeal before the Court of Appeal, where the remarks, damaging to it as an institution, had been made.

G

[12] The sole purpose of the intervention application by AIAC, was to expunge those portions of the dissenting minority judgment of Hamid Sultan Abu Backer JCA which contained detrimental pronouncements against it.

H *Proceedings on 7 November 2018 before the Federal Court*

[13] AIAC's notice of motion seeking leave to intervene and to expunge parts of the minority judgment of the Court of Appeal was fixed for hearing on 7 November 2018. It was listed for disposal before a panel of three judges of the I Federal Court, as is customary with all applications for leave to appeal to the Federal Court.

[14] The relevant parties were present on the day. This included the two private litigants, namely the applicant for leave to appeal to the Federal Court,

ie PCP, as well as the respondent, Leap Modulation Sdn Bhd through their respective counsel. The AIAC, as the intended intervener was present through its team of counsel, namely Vinayak Pradhan and five others. The International Group of Arbitrators Bhd and the Society of Construction Law held watching briefs through their respective counsel too.

[15] It is significant to note that 7 November 2018 was not fixed for the application for leave to appeal. It was fixed solely for the AIAC's application.

[16] When the matter came up for hearing, counsel for the AIAC submitted that its application comprised both an application for intervention and for expunction of parts of the minority judgment as identified in the application. The portions sought to be expunged encompassed some 17 paragraphs of the minority judgment.

[17] Learned counsel went on to explain that AIAC had not been a party to the proceedings in the civil appeal, and was not therefore present at the hearing of the same. No allegations had been made against AIAC in the pleadings, nor evidence led, which could have formed the basis for the 'oppressive' and 'objectional' findings made in the minority judgment. Neither were the parties to the litigation invited to submit on these matters in the course of the civil appeal.

[18] These 'objectional' and 'oppressive' findings state in summary, inter alia, that:

(a) it is unusual to allow KLRCA which was formed and is under the auspices of the Asian African Legal Consultative Organisation ('AALCO') and therefore a foreign governmental organisation to be accorded the monopoly to administer matters related to arbitration as well as the CIPAA 2012. This has resulted in KLRCA directly or indirectly collecting revenue with no safeguards to sustain accountability, transparency and good governance. This foreign governmental organisation was instrumental in structuring legislation such as the CIPAA 2012 to benefit this foreign governmental organisation and to compromise the administration of justice in Malaysia;

(b) KLRCA and thereby AALCO has utilised the CIPAA 2012 regime to procure extra fees giving rise to an unjust state of affairs. KLRCA (AALCO) should be probed to ascertain whether it is effectively operating as a commercial organisation for commercial gain rather than the administration of justice. The judgment questioned what a foreign governmental organisation has to do with access to justice and administration of justice in Malaysia;

A (c) the government could not provide such an 'autonomous organisation' a form of statutory recognition to collect fees or any form of revenue without adhering to government protocols and restrictions on how money is spent. Such collection of revenue and unaccounted spending breached the rule of law;

B (d) it was against the rule of law as well as the Federal Constitution to provide a monopoly to a foreign governmental organisation to be involved in access to or administration of justice;

C (e) the activities of KLRCA (AALCO) 'is basically commercial in nature'. If allowed to participate in access to justice through a statutory regime it 'may corrupt or have corrupted the system itself' in ways that could not be elaborated in the judgment; and

D (f) there are several other paragraphs in the same vein culminating in the 'view' that this was a 'fit and proper case' to direct the forwarding of a copy of the judgment to the Malaysia Anti-Corruption Commission as well as the Inspector General of Police to study the judgment and take immediate action as they saw fit.

E **[19]** These pronouncements were made in the dissenting minority judgment without KLRCA, now AIAC, being accorded the opportunity to be heard.

[20] The judgment, as well as the portions sought to be expunged, were all F before the Federal Court.

[21] On this basis, counsel for the AIAC sought firstly, an intervention in the proceedings and then, the expunging of parts of the judgment. The damage to the reputation of the AIAC in terms of arbitration and thereby the country, was G explained in the course of submissions.

[22] Clarification was sought by the Federal Court as to whether both prayers namely the intervention and the expunction could be dealt with together. All counsel then indicated that they had no objections to both the H intervention and expunction prayers being granted in favour of AIAC.

[23] It should be noted that there was also a prayer that the application for intervention and expunction be heard together with the appeal. However, as is I evident from the notes of proceedings, AIAC explained to the Federal Court that the motion to intervene and expunge had nothing whatsoever to do with the merits of the case. There was therefore no necessity to wait until the leave application had been heard or granted for AIAC's application to be disposed of.

[24] Both the applicant and the respondent, ie the private parties to the litigation, had no objection to the intervention and the expunction. All parties before the court that morning, consented to both prayers sought by AIAC, namely for intervention and expunction, being granted. The prayer for AIAC's motion to be heard together with the appeal therefore became nugatory.

[25] The Federal Court then went on to grant the prayers for intervention and expunction, premised on the submissions and the cause papers and documents before them, as borne out by the court transcript of the notes of proceedings.

THE PUBLISHING OF THE TWO ARTICLES

[26] On 14 February 2019, Justice Hamid Sultan Abu Backer filed a personal affidavit in pending proceedings before the High Court. In his affidavit, the judge of the Court of Appeal made reference to the *Leap Modulation* case and the proceedings before the Federal Court.

[27] Shortly after this affidavit had been circulated widely, particularly through social media, the two impugned articles were published on the 16 and 22 February 2019 by Aliran, quoting Arun Kasi as the maker of the content of those articles.

THE CONTENT OF THE ARTICLES

[28] In the first and second articles, Arun Kasi made, inter alia, the following statements in relation to the expunction of portions of the minority judgment by the Federal Court:

First Article:

> Six days ago, I had complained to the Malaysian Anti-Corruption Agency (MACC) about the irregularities in the Leap Modulation case ...
>
> In this case, Justice Hamid Sultan's judgment in the Court of Appeal was partly expunged by the Federal Court in an unprecedented manner — even without an appeal
>
> The Federal Court made an order allowing the intervention and straight ordered the expungement. It was a sort of exparte or unilateral order.
>
> Five anomalies.
>
> The various anomalies in connection with the manner, or process, by which the decision was made included the following:
>
> 1) Unprecedented unilateral expungement

A ...

But in this case, straight with the leave to intervene, the expungement order was made, thereby negating the need for the AIAC to file any appeal to challenge the impugned parts of the dissenting judgment. To my knowledge this is unprecedented.

B 2) Right parties absent

The right parties were not before the court. The right party that must have been heard in opposition was the Attorney General as the guardian of public interest.

C 3) Only three judges

The panel that decided the expungement was a leave panel made of three judges. The Chief Justice in new Malaysia had made a commitment by public statement that any appeal before the Federal Court would be heard by a five or seven-member panel.

D 4) Unknown grounds for expungement

... however, until now, no such grounds for the expungement were given. The grounds remain unknown.

5) Recourse to lodge complaints also expunged

E Most strangely, the parts of the judgment in effect about making a report to the inspector general of police and the MACC (by way of direction for due investigation) too was expunged.

This is unheard of — that someone is stopped from lodging a complaint to any lawful authority that may receive the complaint.

In my view, the above warranted a report to the MACC and a call upon the F Bar Council to intervene to uphold the cause of justice.

Second Article

I made a complaint to the Malaysian Anti-Corruption Commission (MACC) on 9 G February 2019 in the matter of *PCP Construction v Leap Modulation*.

My allegation were that certain parts of Justice Hamid Sultan Abu Backer's judgment in that case at the Court of Appeal were expunged by the Federal Court in an unusual manner. This included expungement at the stage of the application by the AIAC application to intervene.

H

THE ATTORNEY GENERAL'S CASE IN SUMMARY

[29] The thrust of the attorney general's case is that all the statements or allegations above, made against the Federal Court, exceed and go far beyond I what could reasonably be considered to be fair criticism.

[30] The 'irregularities' or anomalies as set out in the two articles pertaining to the expunction of portions of the dissenting minority judgment, relate to the exercise of a judicial function by the judges of the Federal Court. These

anomalies insinuate that the judges who heard and determined the application to intervene and expunge were guilty of misconduct, involved in corrupt activity and had compromised their integrity, to the extent that this warranted an investigation by the MACC.

[31] It is universally known that the MACC is vested with powers of investigation in relation to offences of corruption. As such the articles suggest that the judges of the Federal Court behaved corruptly in allowing AIAC's application.

[32] Arun Kasi's allegation that he was exercising his right of fair criticism fails because he has taken contradictory stances in relation to the investigation into the alleged 'anomalies' in the *Leap Modulation* case. On the one hand, in the articles, Arun Kasi echoes the need for MACC to investigate into the anomalies that relate directly to the hearing to intervene and expunge by AIAC. In other words it is suggested that the judges be investigated for corrupt practice.

[33] However on a television talk show entitled 'Agenda Awani' on 19 February 2019, Arun Kasi is reported to have said that the police and the MACC *cannot* probe a judge of the Court of Appeal Hamid Sultan Abu Backer's allegations of wrongdoing in the Judiciary against his will. The reason given was that it would amount to a breach of the doctrine of the separation of powers. There is a clear contradiction in his stance. Such a contradiction establishes that while the judges of the Federal Court hearing the AIAC application could be investigated by MACC, Justice Hamid Sultan Abu Backer should not be investigated in respect of his allegations of wrongdoing in the Judiciary. This anomaly shows that he is less than bona fide in his alleged 'fair criticism' of the judiciary.

[34] The attorney general submitted that in determining whether the contempt of scandalising the court had been established the court should utilise an objective test, rather than taking into account Arun Kasi's subjective stated intent.

[35] As the articles established contempt of scandalising the court beyond reasonable doubt this was a fit case for the court to grant the relief sought.

ARUN KASI'S CASE IN SUMMARY

[36] Arun Kasi maintains that these statements were not made in relation to or against the Federal Court or the Judiciary. His counsel maintained that the statements as set out above cannot be said to scandalise the Judiciary because the attack was primarily against the AIAC, and not the Judiciary.

[37] Even if it was found to be the case that he had made statements which appeared to scandalise the Judiciary, both he and his counsel maintain that it amounts to fair criticism. Finally he contends that there have been numerous other articles that have been published recently that are calculated to bring the administration of justice into disrepute and erode public confidence in the Judiciary. In view of the existence of the other offending articles, his article, which his counsel contends is relatively mild, ought not to be singled out for punishment as eroding public confidence in the institution. Put another way, as public confidence in the Judiciary has already been eroded, Arun Kasi's article does not in itself have the effect of impairing public confidence. Even if it does, he ought not to be singled out for committal for scandalising contempt in relation to the two articles.

THE HEARING BEFORE US

[38] Of primary importance at the hearing before us was the oral evidence of Arun Kasi, which he opted to give in addition to filing a notice of intention to refer to the following affidavits: encl 55 dated 7 March 2019 (the affidavit in support of the application to set aside the exparte leave), encl 72 dated 15 March 2019 (the affidavit in opposition to the AG's substantive motion for committal) and encl 76 dated 20 March 2019 (the affidavit in support of Arun Kasi's application to cross-examine the AG). Insofar as his oral evidence is concerned, in essence he testified as follows:

(a) the contents of his press release sent to Aliran which were subsequently published as the articles, were primarily centred on the CIPAA 2012, and not the Judiciary. He was intent on reforming the adjudication scheme as outlined in the CIPAA 2012. He stated that he had acted in the public interest;

(b) he pointed out that the publications were by Aliran and not himself. He stated that the various sub-headings in the two articles were not his, but were crafted by Aliran. He clarified that he had sent a 'press release' to Aliran with an appendix setting out the facts on AIAC as well as the expunged dissenting judgment;s

(c) he maintained that the manner in which the expunction order had been obtained was not regular;

(d) he stated that he was merely a 'whistle-blower' to MACC; and

(e) he was asked about the contradiction in relation to an investigation by MACC of his allegations of irregularities in *Leap Modulation* in his articles as opposed to the position he took during the interview he gave to Astro Awani. In the former he stated that MACC should investigate the anomalies of the proceedings and the order granted. In the latter interview he stated that judges could not be investigated by the MACC

by reason of the breach of the doctrine of the separation of powers. Arun Kasi maintained that there was no such contradiction. He explained that he never stated in the articles who or what precisely ought to be investigated by MACC. In his interview with Astro Awani however, he stated that judges could not be investigated by MACC by reason of the separation of powers. In his testimony before this court he maintained that he never intended for the three judges in the *Leap Modulation* case to be investigated by MACC.

A

B

THE ISSUES BEFORE THE COURT

C

[39] The specific issue before this court was whether Arun Kasi had committed the offence of scandalising contempt in providing the material for the two articles published by Aliran on 16 February 2019 and 22 February 2019.

D

[40] This requires a consideration of the applicable principles in relation to the offence of scandalising contempt and its applicability to the present case.

OUR ANALYSIS AND DECISION

E

The concept underlying the law of contempt of scandalising the court

[41] The courts of justice are the bulwark of a nation. Alexander Hamilton famously recognised, in the doctrine of the separation of powers, that the legislature controls money, the executive controls force and the Judiciary controls nothing. It is on public confidence that the Judiciary depends, for the general acceptance of its judicial decisions, by both citizens and the government. The public conforms to the decisions of the Judiciary, because they respect the concept of judicial power and the judges who exercise such power (see *Public Confidence in the Judiciary* by Murray Gleeson, Judicial Conference of Australia, Launceston, 2002).

F

G

[42] Therefore the trust and confidence of the people in the judicial system to deliver impartial justice comprises the very foundation of the Judiciary.

H

[43] The concept of contempt of court is essential to protect public confidence in the Judiciary and the administration of justice. The rationale behind the concept has been stated in the English locus classicus on this subject, namely the *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54 by Lord Morris and followed by Steve Shim CJ (Sabah and Sarawak) in the case of *Zainur bin Zakaria v Public Prosecutor* [2001] 3 MLJ 604:

I

> ... For a better perspective of this concept, I can do no better than refer to the illuminating speeches made by a strong panel of Law Lords in *Attorney General v*

Times Newspaper Ltd [1973] 3 All ER 54 (universally known as '*The Thalidomide* case'). Therein, Lord Morris has said as follows:

> ... the phrase 'contempt of court' is one which is compendious to include not only disobedience to orders of a court but also certain types of behaviour or varieties of publications in reference to proceedings before courts of law which overstep the bounds which liberty permits. In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognized courts of the land are so flouted that their authority wanes and is supplanted. But as the purpose and existence of the courts of law is to preserve freedom within the law for all well-disposed members of the community, it is manifest that the courts must never impose any limitations on free speech or free discussion or free criticism beyond those which are absolutely necessary. When therefore a court has to consider the propriety of some conduct or speech or writing decision will often depend on whether one aspect of the public interest definitely outweighs another aspect of the public interest. Certain aspects of the public interest will be relevant in deciding or assessing whether there has been contempt of court. But this does not mean that if some conduct ought to be stigmatized as being contempt of court it could receive absolution and be regarded as legitimate because it had been inspired by a desire to bring about a relief of some distress that was a matter of public sympathy and concern. There can be no such thing as a justifiable contempt of court.

These are words of unparalleled wisdom which should be engraved in tablets of stone.

[44] In *Attorney General & Ors v Arthur Lee Meng Kuang* [1987] 1 MLJ 206 the court recognised the concept at p 208:

> ... In this country, the need to protect the dignity and integrity of the Supreme Court and the High Court is recognised by art 126 of the Federal Constitution and also by s 13 of the Courts of Judicature Act 1964. A proper balance must therefore be struck between the right of speech and expression as provided for in art 10 of the Federal Constitution and the need to protect the dignity and integrity of the Superior Courts in the interest of maintaining public confidence in the Judiciary. On criticism of the court's judgment, we find the law has been well stated by Salmon LJ in *Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn (No 2)* [1968] 2 QB 150 where at p 155G he said:
>
> > It follows that no criticism of a judgment, however vigorous, can amount to contempt of Court, providing it keeps within the limits of reasonable courtesy and good faith.

> Whether a criticism is within the limits of reasonable courtesy and good faith must in our view, depend on the facts of each particular case. In determining the limit of reasonable courtesy the court should not however lose sight of local conditions, a proposition laid down in *Public Prosecutor v The Straits Times Press Ltd* [1949] 1 MLJ 81 and *Public Prosecutor v SRN Palaniappan & Ors* [1949] 1 MLJ 246 where Spenser Wilkinson J hesitated, quite correctly, to follow too closely the decisions of English Courts on the subject of contempt without first considering whether the relevant conditions in England and this country are similar.

[45] Therefore it is essential not to follow blindly the position in law in England and Wales and other jurisdictions, but to ascertain local conditions and apply the law in accordance with the needs and circumstances of the common law of Malaysia. In point of fact the offence of scandalising the court has been abolished in England and Wales (by virtue of s 33 of the Crime and Courts Act 2013). It does not therefore follow that we too ought to abolish the law. It is incumbent to assess our local circumstances and conditions. The prevailing conditions in England and Wales do not prevail here. This has been captured in *Arthur Lee Meng Kuang*'s case (above):

> The Supreme Court was given birth only on January 1, 1985, and its sensitivity need not be the same as courts of similar jurisdiction in England or other countries. Having regard to local conditions, criticism which are considered as within the limit of reasonable courtesy elsewhere, are not necessarily so here.

[46] And in the case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and another application* [1990] 1 MLJ 273 Abdul Hamid LP (as he then was) highlighted the necessity to have the law of contempt in the interests of maintaining public confidence in the Judiciary:

> ... It is not necessary for us on this occasion to consider those authorities again except to reiterate what has been said in those cases that in this country there is the need to protect the dignity and integrity of the Supreme Court as well as the High Court which is recognised by art 126 of the Federal Constitution and also by s 13 of the Courts of Judicature Act 1964. In consideration, a proper balance must be struck between the right of freedom of speech as provided for in art 10 of the Federal Constitution and the need to protect the dignity and integrity of the Supreme Court in the interest of maintaining public confidence in the Judiciary. In light of these authorities, it is established, inter alia, that whether a criticism of a judgment is within the limits of reasonable courtesy and good faith must depend on the facts of each particular case and in determining the limit of reasonable courtesy the court should not lose sight of local conditions.

[47] There is nothing to warrant this court departing from the sentiments expressed in these cases even in the present day. This is because the balance between the freedom of speech and expression as provided in art 10 of the Federal Constitution has to be weighed against the need to ensure that public confidence in the Judiciary, the third arm of government is not eroded.

ARTICLE 10 OF THE FEDERAL CONSTITUTION

(1) Subject to Clauses (2), (3) and (4) —

(a) *every citizen has the right to freedom of speech and expression;*

(b) ...

(c) ...

(2) Parliament may by law impose —

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

...

[48] Although Parliament has not enacted specific law on contempt of court, the jurisdiction and power to deal with contempt is encapsulated in art 126 of the Federal Constitution, s 13 of the Courts of Judicature Act 1964 ('the CJA') as well as O 52 of the Rules of Court 2012.

[49] In the absence of specific written rules on details relating to matters of contempt by virtue of s 3 of the Civil Law Act 1956, the common law principles are applicable side by side with the written legislation in art 126 of the Constitution and s 13 of the CJA 1964.

[50] The common law position on contempt of court has been elaborated by Lord Morris in the Privy Council in the case of *McLeod v St Aubyn* [1899] AC 549 as follows:

> Committals for of court are ordinarily in cases where some contempt ex facie of the court has been committed, or for comments on cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. Lord Hardwicke so lays down without doubt in the case of *In re Read & Huggonson* [1742]. He says, 'One kind of contempt is scandalising the court itself'. The power summarily to commit for contempt of court is considered necessary for the proper administration of justice.

[51] Our courts have been applying the common law principles to give effect to art 126 of the Constitution and s 13 of the CJA 1964. Our apex court has consistently applied the common law principles of contempt of court as seen in the judgments in some of the cases such *AG & Ors v Arthur Lee Meng Kuang*, *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383, *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and*

another application [1990] 1 MLJ 273.

[52] As articulated by the attorney general, freedom of speech and expression in art 10 are not absolute. There are restrictions to that freedom. One of the most well-known restrictions is contempt of court. One might question why in this day and age such an exception or restriction to freedom of speech and expression should subsist. The reason is simple enough, namely to ensure that the right of the citizens of Malaysia to have recourse to the courts of the nation to obtain justice is not put at risk. Such a risk arises where confidence in the institution is imperilled or actively eroded to the point where the authority of the courts is no longer recognised nor adhered to. That can only lead to chaos and anarchy.

[53] It is important to emphasise that the jurisdiction of the courts does not exist to protect the dignity of individual judges personally. It serves to protect the Judiciary as the third arm of government rather than individual judges (see *Zainur bin Zakaria*'s case). Neither is such jurisdiction to be utilised to restrict honest criticism, which is based on rational grounds, to ascertain the manner in which the court performs its functions. Any such discussion should, in any event be conducted bona fide, for and in the public interest. At risk of repetition, it is stated again that the jurisdiction subsists to ensure that the authority of the law as administered in the courts is not endangered or flouted.

The power of the AG to initiate contempt proceedings

[54] As stated earlier, the position in law to the power of the attorney general to initiate contempt proceedings, has been dealt with in some detail in our earlier judgment relating to the application by Arun Kasi to set aside the leave for committal. In essence we outlined the position in law in our broad grounds as follows:

(a) the attorney general possesses the power to commence proceedings for committal for contempt by virtue of the common law as borne out by the cases of, inter alia, *Arthur Lee Meng Kuang*'s case, *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383 and *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and another application* [1990] 1 MLJ 273. As stated in the Court of Appeal case of *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321 at p 334 ('Murray Hiebert'), there is no reason to depart from the principles in those cases. The common law as expounded, applied and decided by our courts after 7 April 1956 by virtue of the Civil Law Act 1956 has become part of our law;

(b) accordingly the attorney general did not act ultra vires art 145(3) of the Federal Constitution and had the requisite locus standi to initiate the

contempt proceedings (see also *Tommy Thomas v Peguam Negara, Malaysia and other appeals* [2001] MLJU 767; [2001] 3 CLJ 457 where the Court of Appeal relied on *Balogh v Crown Court at St Albans* [1974] 3 All ER 283; [1975] QB 73);

(c) the rationale for the attorney general initiating contempt proceedings is so that the judge against whom the alleged contempt is committed does not become both the prosecutor and the judge. In other words the alleged contemnor is accorded the full benefit of the rights of natural justice, in that a third party namely the attorney general brings the action rather that the court itself; and

(d) the court declined to adopt a narrow and literal reading of art 145 of the Federal Constitution which would result in an absurd result whereby the attorney general who is the guardian of public interest is held not to be competent to bring contempt proceedings to safeguard public confidence in the administration of justice.

The test to be applied in determining whether scandalising contempt has or has not been committed

[55] As submitted by the attorney general, the test for liability of the offence of scandalising contempt is objective in nature. This is derived from case-law extending from the earliest English common law cases to Malaysian case-law on contempt. *The test is whether, having regard to the facts and the context of the publication, the impugned statements pose a real risk of undermining public confidence in the administration of justice?*

[56] This is naturally subject to the qualification that where an impugned statement constitutes fair criticism, it does not amount to the offence of scandalising contempt (see *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321; *Public Prosecutor v SRN Palaniappan & 2 Others* [1949] 1 MLJ 246 at p 248 per Spenser-Wilkinson J; *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54; [1974] AC 273; *R v Duffy and Others, Ex parte Nash* [1960] 2 QB 188 at p 200; *Au Wai Pang v Attorney-General* [2016] 1 SLR 992; [2015] SGCA 61; *Shadrake Alan v Attorney-General* [2011] 3 SLR 778; [2011] SGCA 26 ('Shadrake Alan').

[57] In applying the 'real risk' test, the court is expected to avoid taking either extreme of the legal spectrum (see para 36 of *Shadrake Alan*):

(a) either finding contempt where there is only a remote or fanciful possibility that public confidence will be undermined; or

(b) finding contempt only in the most serious situations.

And whose confidence is referred to in the phrase 'undermining public confidence? A

It refers to the ordinary reasonable reader of average intelligence (per Low Hop Bing J in the High Court judgment of *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240. The appeal was dismissed by the Court of Appeal in *Murray Hiebert* which did not overrule the High Court on this point). B

[58] In conducting the objective inquiry, the court should assess whether the statement would undermine public confidence in the administration of justice based on its effect on the ordinary reasonable reader of average intelligence. C

[59] In this context the court does not substitute its own subjective view nor the subjective view of the alleged contemnor (see para 34 of *Shadrake Alan*) quoting Lord Radcliffe in the UK House of Lords case of *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at p 728.) As such, it follows that in determining whether there is a real risk of undermining public confidence in the administration of justice (see *Solicitor-General v Radio Avon Ltd and Another* [1978] 1 NZLR 225 at p 234, NZ (CA)), each case must turn on its own facts and the context in which the impugned statements are made (see paras 35–36 and 56 of *Shadrake Alan*). D E

[60] The court in para 18 of *Au Wai Pang* 'caution[ed] against an overtly pedantic approach to delineating the 'elements' of the offence'. The court stated that '... what must be present in order to sustain a conviction for scandalising contempt is that: (a) the statement in question poses a real risk of undermining public confidence in the administration of justice; (b) the respondent had intended to publish the statement in question; and, importantly (c) the respondent had not done so pursuant to fair criticism ...'. Element (b) will be discussed under the topic of mens rea below. Element (c) will be discussed under the topic of fair criticism below. Meanwhile element (a) is discussed under the topic of 'application of the foregoing principles to the present case', below. F G

The mens rea test H

[61] The only requirement is that the publication of the impugned articles is intentional. It is not necessary to prove an intention to undermine public confidence in the administration of justice or the Judiciary. It does not matter whether the author or the publishers intended the result. It follows therefore, that it is no defence for the author of such impugned statements to claim that he did not know that the statements would have the effect of undermining public confidence or that he did not intend to erode public confidence in the administration of justice. I

[62] In determining this issue we were guided by case-law both Malaysian and from other jurisdictions. Learned counsel for Arun Kasi relied on the case of *Dhooharika v Director of Public Prosecutions (Commonwealth Lawyers' Association intervening)* [2015] AC 875, a Privy Council case from the Supreme Court of Mauritius ('Dhooharika'), to submit that this court should depart from the traditional test for mens rea and adopt that stipulated in *Dhooharika*.

[63] In *Dhooharika* the Privy Council stated that the mens rea for scandalising contempt required the prosecution to establish an intention to interfere with the administration of justice. Here the test for mens rea is for the prosecution to establish that the publication is intentional.

[64] There is a clear difference between establishing an intention to interfere with the administration of justice and that the publication is intentional. The former requires a higher standard, and more importantly, requires some form of insight into the workings of the alleged contemnor's mind. The former test also requires an assessment of a subjective intent, as opposed to the test we apply, which utilises an objective basis, namely the text of the impugned statements, the context in which it is made and the surrounding circumstances.

[65] The attorney general in response, stated that in Malaysia we have adhered to the English common law in relation to the test for mens rea in scandalising contempt. Upon adoption into our case law over the years, it has comprised the basis for Malaysian common law on scandalising contempt. Turning to *Dhooharika*, he categorised the case as comprising Mauritian common law rather than English common law. He then urged us to retain the present test rather than to depart from, and adopt the Mauritian position in *Dhooharika*.

[66] The attorney general also referred to the Singapore case of *Au Wai Pang v Attorney-General* [2016] 1 SLR 992; [2015] SGCA 61 where the Singapore Court of Appeal declined to follow *Dhooharika*. The exposition by Andrew Phang JA is meticulous and extensive. We can do no better than to accept and adopt the judicial reasoning set out there.

[67] In essence we concur that adopting a mens rea test which requires the prosecution to prove an intention to interfere with the administration of justice needs proof of the subjective intention of the alleged contemnor to so interfere. This is difficult to establish because it entails an inquiry into the inner workings of the alleged contemnor's mind.

[68] In any event, whenever a subjective intent is required to be established this can only be done by a consideration of the alleged contemnor's conduct,

statements and the surrounding circumstances, all of which are to be assessed objectively. In that sense as pointed out by Andrew Phang JA, there is not such a great difference between our approach and that of the Privy Council in *Dhooharika*. Here too, we have taken pains to consider the entirety of the circumstances and the content of Arun Kasi's statements.

[69] However if the intention is to make it more difficult to establish mens rea in the offence of scandalising contempt, we likewise respectfully decline to adopt the approach in *Dhooharika*. We decline to do so because the local prevailing conditions and environment differ considerably from that in England and Wales. Therefore the references by the Privy Council in *Dhooharika* to the arguments for abolishing the offence of scandalising the court as enunciated by Lord David Pannick QC (and as urged upon us by counsel for Arun Kasi in their written submissions) are not relevant in the context of Malaysia today. Although, as pointed out by Andrew Phang JA, the Privy Council did note that it was not concerned with the law of England and Wales but that of Mauritius, this did not deter them from setting what was in effect a more stringent test whereby the prosecution is constrained to prove the subjective intent.

[70] Such a stringent mens rea test is not suitable in the local context. There is no reason for us to depart from the position under Malaysian common law. We do not require a more stringent test because the offence is not obsolete in this country as may be the case elsewhere. It must be clarified that we are in no way discouraging cogent and rational complaints of corruption which should be directed to the relevant authorities. What is not encouraged are general scurrilous allegations, devoid of any cogent or rational particulars which are made irresponsibly, and which have the effect of tainting the Judiciary as an institution generally. That has the effect of eroding public confidence in the administration of justice and comprises the core element for scandalising contempt.

Fair criticism

[71] The notion of fair criticism goes towards liability. It is an integral part of finding liability for contempt, rather than a defence after the finding of liability has been made. (Andrew Phang JA discussed in great detail whether fair criticism goes towards liability or is a defence for contempt in the case of *Shadrake Alan*, paras 58–80.)

[72] The legal burden rests on the prosecution to prove beyond reasonable doubt that the statement does not constitute fair criticism. The evidential burden rests on the party relying on fair criticism (see para 78 of *Shadrake Alan*).

[73] Fair criticism must be supported by argument and evidence, and have a rational basis. General and vague references do not constitute a rational basis. A serious allegation calls for a highly cogent rational basis (see *Shadrake Alan*'s case at para 139).

[74] In *Shadrake Alan*'s case, it was stated that in approaching the concept of fair criticism, the court should bear in mind the non-exhaustive factors set out in *Attorney-General v Tan Liang Joo John and others* [2009] SGHC 41. Some of the factors to be considered in determining whether mala fides has been proved include:

(a) the extent to which the allegedly fair criticism is supported by argument and evidence (there must be some reason or basis for the criticism);

(b) the manner in which the alleged criticism is made (it must generally be expressed in a temperate and dispassionate manner, because if outrageous and abusive language is used, an intention to vilify the courts is easily inferred); and

(c) the party's attitude in court.

[75] An underlying theme to be found in the cases discussed in *Tan Liang Joo John* is that the comment must be honest and true in order to constitute fair criticism: see *Radio Avon Ltd* at p 231, per Grose J in *Rex v White* (1808) 1 Camp 359; 170 ER 985. Further, *Shadrake Alan* made reference to the report of the Law Commission of England and Wales entitled *Offences Relating to Interference with the Course of Justice* (Law Commission No 96, 7 November 1979) and concluded from the recommendation 3.70 that:

> In other words, a person will not be convicted of contempt if either (a) the allegation made by him or her is true; or (b) the allegation is false, but the alleged contemnor honestly believed it to be true and was not reckless as to whether it was true or false.

(See para 72 of *Shadrake Alan*.)

Application of the foregoing principles to the present case

[76] In *Shadrake Alan*'s case, the key question formulated by Andrew Phang JA was 'does the impugned statement constitute fair criticism, or does it go on to cross the legal line by posing a real risk of undermining public confidence in the administration of justice — in which case it would constitute contempt instead?'.

[77] Therefore, in deciding whether Arun Kasi's impugned statements amount to scandalising contempt, it is necessary to interpret or construe his statements in the two articles objectively and holistically, applying the test set

out above, namely, whether *having regard to the facts and the context of the publication, the impugned statements pose a real risk of undermining public confidence in the administration of justice*?

[78] In the instant case the test is applied to both the articles. We are aware from Arun Kasi's testimony that he sent a 'press release' to Aliran. This can only have been done with a view to procuring publication of his statement. Arun Kasi's defence was that his press release was significantly edited by Aliran. We need to show that in substance, the two articles materially reproduced the press release.

[79] At this juncture, it is pertinent to refer to the O 52 statement of the AG. For ease of reference, we set out the O 52 statement and the press release in tabular form below:

(a) para 9 of the O 52 statement of the attorney general relates to committal in respect of several paragraphs in the first article by Arun Kasi. The allegedly contemptuous content of the first article is examined paragraph by paragraph and contrasted with the press release dated 9 February 2019 in the table below.

Paragraph 9 of the O 52 Statement	Source
'Six days ago, I had complained to the Malaysian Anti-Corruption Agency (MACC) about the irregularities in the Leap Modulation case ...'	Taken from para 2 of the press release which reads as follows: '2. The decision shocked me and in my view will shock the legal fraternity. In my considered view, there were serious anomalies associated with the decision, that warranted a report to MACC for its due investigation, which I did so today in public interest'.
'2. The decision shocked me and in my view will shock the legal fraternity. In my considered view, there were serious anomalies associated with the decision, that warranted a report to MACC for its due investigation, which I did so today in public interest'.	Taken from para 9(a) of the press release which reads as follows:

	'9(a) First, what came up for hearing on 07/11/2018 was only the intervention-leave application. In ordinary practice, in an application for leave to intervene, all that the court will decide is whether leave to intervene was allowed or not. If it was allowed, then the court will give directions for parties to file cause papers and fix a hearing date. But in this case, straight with the leave to intervene, the expungement order was made, thereby negating the need for AIAC to file any appeal to challenge the impugned parts of the dissenting judgment. To my knowledge, this is unprecedented'.
'In my considered view, here were serious anomalies associated with the decision that warranted a report to the Malaysian Anti-Corruption Commission (MACC) for its due investigation, which I did so on 9 February 2019 in public interest'.	Taken from para 2 of the press release which reads as follows: '2. The decision shocked me and in my view will shock the legal fraternity. In my considered view, there were serious anomalies associated with the decision, that warranted a report to MACC for its due investigation, which I did so today in public interest'.
'The Federal Court made an order allowing the intervention and straight ordered the expungement. It was a sort of exparte or unilateral order'.	Taken from para 8 of the press release which reads as follows: '8. The Leave application of the AIAC came up for hearing before the Federal Court on 07/11/2018. PCP and Leap, quite naturally, did not object to the application. The Federal Court made an order allowing the intervention and straight ordered the expungement. It was a sort of exparte or unilateral order'.
Five anomalies.	Taken from para 9 of the press release which reads as follows:

The various anomalies in connection with the manner, or process, by which the decision was made included the following:	'9. The various anomalies in connection with the manner, or process, by which the decision was made included the following:
1) Unprecedented unilateral expungement ... But in this case, straight with the leave to intervene, the expungement order was made, thereby negating the need for the AIAC to file any appeal to challenge the impugned parts of the dissenting judgment. To my knowledge this is unprecedented.	(a) First, what came up for hearing on 07/11/2018 was only the intervention-leave application. In ordinary practice, in an application for leave to intervene, all that the court will decide is whether leave to intervene was allowed or not. If it was allowed, then the court will give directions for parties to file cause papers and fix a hearing date. But in this case, straight with the leave to intervene, the expungement order was made, thereby negating the need for AIAC to file any appeal to challenge the impugned parts of the dissenting judgment. To my knowledge, this is unprecedented.
2) Right parties absent The right parties were not before the court. The right party that must have been heard in opposition was the Attorney General as the guardian of public interest.	(b) Second, the right parties were not before the court. The right party that must have been heard in opposition was the Attorney General as the guardian of public interest.
3) Only three judges The panel that decided the expungement was a leave panel made of three judges. The Chief Justice in new Malaysia had made a commitment by public statement that any appeal before the Federal Court would be heard by a five or seven-member panel.	(c) Third, the panel that decided the expungement was a leave panel made of 3 judges. The Chief Justice in new Malaysia had made a commitment by public statement that any appeal before the Federal Court would be heard by a 5 or 7 member panel. This will essentially include any substantive application, other than leave, incidental or interlocutory application. Why was the application rushed and decided without hearing an appeal proper on that issue?

4) Unknown grounds for expungement ... however, until now, no such grounds for the expungement were given. The grounds remain unknown.	(d) Fourth, expungement is something very serious and happens rarely. If that happens, the practice has been that the expunging court will give ground (sic) there and then or at least shortly after that. However, until now, no such grounds for the expungement were given. The grounds remain unknown.
5) Recourse to lodge complaints also expunged Most strangely, the parts of the judgment in effect about making a report to the inspector general of police and the MACC (by way of direction for due investigation) too was expunged. This is unheard of — that someone is stopped from lodging a complaint to any lawful authority that may receive the complaint. In my view, the above warranted a report to the MACC and a call upon the Bar Council to intervene to uphold the cause of justice.	(e) Fifthly and most strangely the parts of the judgment in effect making a report to the IGP and MACC (by way of direction for due investigation) too was (sic) expunged. This is unheard of that that (sic) someone is stopped from lodging a complaint to any lawful authority that may receive the complaint'.

(b) as we can see, the substance of the words in the first article which form the basis of the attorney general's grounds for committal, are also materially taken from the press release. We now do the same analysis for the statements in the second article which the attorney general set out in para 10 of the O 52 statement:

Paragraph 10 of the O 52 statement	Source
'I made a complaint to the Malaysian Anti-Corruption Commission (MACC) on 9 February 2019 in the matter of PCP Construction v Leap Modulation'.	Taken from para 2 of the press release which reads as follows: '2. The decision shocked me and in my view will shock the legal fraternity. In my considered view, there were serious anomalies associated with the decision, that warranted a report to MACC for its due investigation, which I did so today in public interest'. It is noted that the press release is dated 9 February 2019.

'My allegations were that certain parts of Justice Hamid Sultan Abu Backer's judgment in that case at the Court of Appeal were expunged by the Federal Court in an unusual manner. This included expungement at the stage of the application by the AIAC application to intervene'.	Taken from para 9(a) of the press release which reads as follows: '9(a) First, what came up for hearing on 07/11/2018 was only the intervention-leave application. In ordinary practice, in an application for leave to intervene, all that the court will decide is whether leave to intervene was allowed or not. If it was allowed, then the court will give directions for parties to file cause papers and fix a hearing date. But in this case, straight with the leave to intervene, the expungement order was made, thereby negating the need for AIAC to file any appeal to challenge the impugned parts of the dissenting judgment. To my knowledge, this is unprecedented'.

[80] We conclude from a side-by-side, paragraph-by-paragraph analysis of the press release and the statements upon which the attorney general considered as grounds for committal of Arun Kasi, that the substance of the two impugned articles were taken from the press release, with minimal editing by Aliran. Therefore Arun Kasi's reliance on the press release does not benefit his case, as there are no substantial differences between it and the two impugned articles. It is apparent from the two articles that they comprise substantively, if not wholly, of the contents of Arun Kasi's press release. It does not suffice to restrict our analysis to the press release (as his counsel urged us to do) as the press release was not read by the public. It was the online articles published by Aliran that were read by the public.

[81] Notwithstanding that the publication was by Aliran, the impugned statements were authored by Arun Kasi.

[82] It is on the basis of the impugned statements in the articles that this application for scandalising contempt was initiated by the attorney general. Therefore the statements in the articles and not the press release, comprise the basis on which this court should assess whether such contempt has been made out.

The first article

[83] Arun Kasi admitted that he stated that:

(1) Six days ago, I had complained to the *Malaysian Anti-Corruption Agency (MACC)* about the *irregularities* in the *Leap Modulation case* ...

(2) In this case, Justice Hamid Sultan's judgment in the Court of Appeal was partly expunged *by the Federal Court* in an *unprecedented manner — even without an appeal*

(3) In my considered view, there were *serious anomalies associated with the decision that warranted a report to the Malaysian Anti-Corruption Commission (MACC) for its due investigation,* which I did so on 9 February 2019 in public interest.

(4) The Federal Court made an order allowing the intervention and straight ordered the expungement. It was a sort of exparte unilateral order.

[84] The first impugned statement expressly stipulates there were 'irregularities' in the conduct of the *Leap Modulation* case which were so serious as to *warrant a report to the MACC*, the statutory body dealing with corruption. The impression to be formed by the ordinary reasonable reader of average intelligence is that the conduct of the case was riddled with corruption.

[85] In his second statement the use of the words 'unprecedented manner, even without an appeal' insinuates that the Federal Court rushed through the intervention and expunction of portions of the dissenting judgment in an improper manner. The reader forms the impression that the Federal Court acted in breach of the law, both substantive and procedural.

[86] In the third statement, an objective reading discloses that Arun Kasi expressed his opinion that there were various improprieties with the decision of the Federal Court including corruption, and therefore he was constrained to report the matter to the MACC in the public interest. This would give the ordinary reasonable reader of average intelligence the impression that the Federal Court was corrupt in its handling of the *Leap Modulation* case.

[87] Applying the objective test, the fourth statement suggests that the fact that expunction followed upon the intervention was somehow irregular, in that there was no 'full' hearing. It is also stated that it was 'sort of exparte or unilateral' again implying that the Federal Court had failed to comply with the law both substantively and procedurally.

[88] Taken in its entirety, it is our finding that this series of statements is clearly directed at the Federal Court and thereby the Judiciary as a whole. As

submitted by the attorney general, and we concur, it is an insult to the intelligence of a reasonable reader to conclude otherwise. It is also equally clear that allegations of corruption have been directed at the Judiciary.

[89] That this is the meaning to be attributed to these impugned statements by the ordinary reasonable reader of average intelligence is further borne out by Arun Kasi's own testimony in relation to his statement in the first article. There he stated that the *Leap Modulation* decision 'shocked me' and in his view would 'shock the legal fraternity'. There would be no reason for Arun Kasi or the legal fraternity to be 'shocked' by a decision to expunge unless there was something wholly wrong with the handing down of such a decision.

The 'five anomalies'

[90] The next series of statements in the first article relate to what Arun Kasi describes as the 'Five Anomalies':

> The various anomalies in connection with the manner or process by which the decision was made included the following:
>
> 1) Unprecedented unilateral expungement
> ...
> But in this case, straight with the leave to intervene, the expungement order was made, thereby negating the need for the AIAC to file any appeal to challenge the impugned parts of the dissenting judgment. To my knowledge this is unprecedented.
>
> 2) Right parties absent
> The right parties were not before the court. The right party that must have been heard in opposition was the Attorney General as the guardian of public interest.
>
> 3) Only three judges
> The panel that decided the expungement was a leave panel made of three judges. The Chief Justice in new Malaysia had made a commitment by public statement that any appeal before the Federal Court would be heard by a five or seven-member panel.
>
> 4) Unknown grounds for expungement
> ... however, until now, no such grounds for the expungement were given. The grounds remain unknown.
>
> 5) Recourse to lodge complaints also expunged
> Most strangely, the parts of the judgment in effect about making a report to the inspector general of police and the MACC (by way of direction for due investigation) too was expunged.
> This is unheard of — that someone is stopped from lodging a complaint to any lawful authority that may receive the complaint.
> In my view, the above warranted a report to the MACC and a call upon the Bar Council to intervene to uphold the cause of justice.

[91] The first 'anomaly', which alleges in effect that the AIAC ought to have filed an appeal to challenge the impugned parts of the dissenting judgment, is untenable. This is because it was never an option available to the AIAC to file an appeal, as it was never a party to the proceedings in the *Leap Modulation* case. Therefore no such appeal as suggested by Arun Kasi could ever have been filed.

[92] However AIAC in its application sought intervention and participation in the appeal proper between the private litigants, to be followed by expunction. As is evident from the notes of proceedings, there was consensus between all parties present that both the prayers for intervention and expunction be dealt with immediately, without the need to wait for the leave to appeal application by the private litigant being heard, because the AIAC's application had no nexus whatsoever to the appeal between the litigating parties.

[93] It was, as the attorney general put it, a situation where Justice Hamid Sultan JCA (who delivered the dissenting minority judgment) had 'gone off on a tangent' and made damaging remarks about the AIAC, which was never a party to the proceedings. As a consequence, the AIAC had no option but to make the application to intervene and expunge portions of the judgment demeaning it, as the institution had been denied an opportunity to be heard on these damaging statements.

[94] Therefore it follows that there is nothing irregular or objectionable in the Federal Court hearing and granting the order sought by the AIAC. In point of fact there is ample authority for the court to grant such an order as may be seen in the case of *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501.

[95] As for the second 'anomaly' identified by Arun Kasi, this case was classic private litigation between two parties who had a dispute in relation to monies. The parties were only concerned with upholding or defeating the award handed down by the adjudicator pursuant to the CIPAA 2012. This was not public interest litigation warranting the involvement of the attorney general.

[96] In so far as the AIAC was concerned, the institution was entirely at liberty to defend itself, in view of the breach of natural justice occasioned by the dissenting minority judgment. AIAC did this by filing and having this application disposed of by the Federal Court. By stating that the right parties were not before the court, Arun Kasi issued a misleading statement, because the correct parties, namely the private litigants as well as the AIAC, and the other interested bodies were all present before the court. By further stating that the

attorney general as the guardian of public interest was not heard in opposition, Arun Kasi insinuates that there was grave impropriety in the proceedings. An objective reading of Arun Kasi's statement here gives the impression to the reader that the Federal Court had committed an impropriety by not hearing the attorney general in opposition in the public interest. The reality is that the AG had no role to play as this is simply a private dispute and not public interest litigation.

[97] With respect to the third 'anomaly' where he insinuates a further irregularity by reason of there being 'only' three judges, instead of a five or seven member panel, it is to be borne in mind that applications for leave and any such ancillary applications are routinely heard by a panel of three. This imputation by Arun Kasi is untrue as a matter of fact. Perhaps more significantly, it casts doubt on the integrity of the judicial process, where no such irregularity exists.

[98] The 'fourth' anomaly is the complaint that there are no grounds for the decision. It is not the case that the Federal Court hands down grounds of judgment on every application it hears, more so when such application is uncontested. The use of the words 'unknown grounds for expungement' insinuates that there is some hidden agenda that precludes the Federal Court from making known the grounds to the public. To the ordinary reasonable reader of average intelligence in Malaysia, this would suggest something sinister.

[99] The fifth 'anomaly' which states explicitly that the making of a report to the police and the MACC was expunged by the Federal Court, carries the inference that the Federal Court hindered or prevented the lawful process of lodging a complaint with the authorities. Instead of facilitating a complaint of corruption by the AIAC, the Federal Court instead precluded the lodging of a complaint to the relevant authorities. This is clearly directed at no one other than the Federal Court. It is an untenable proposition because the expunction cannot stop any party intending to make a report with the MACC, to proceed to do so.

The second article

[100] The impugned statements in the second article are essentially a reiteration of the allegations relating to irregularities or improprieties in the expunction of portions of the dissenting judgment at the stage of the intervention application by the Federal Court.

Are Arun Kasi's statements directed at the Federal Court?

[101] We have given serious consideration to Arun Kasi's testimony to the

A effect that the impugned statements in the two articles were NOT directed at the Federal Court or the Judiciary. We have also considered the submissions by learned counsel for Arun Kasi to the same effect. However having applied the objective test we outlined earlier, and reading the articles in their entirety, it is crystal clear that the statements were directed at the Judiciary. To find otherwise B would be an affront to common sense. This is because the expunction could not have been effected without the Federal Court handing down such an order. The Federal Court, in doing so, was merely exercising its judicial function bona fide, as is evident from the notes of proceedings. However the impugned statements insinuate a sinister motive on the part of the Federal Court, which C is untrue.

Did Arun Kasi have the requisite mens rea?

D **[102]** As stated earlier the relevant test is whether Arun Kasi's publication of the two articles was intentional. This is best gleaned from the circumstances surrounding the publication. In his testimony Arun Kasi stated that he had provided a 'press release' to Aliran. This comprised the basis for the two articles.

E **[103]** The issuance of a 'press release' evidences the fact that Arun Kasi wanted the contents of his press release to be made public. There is no other reasonable inference that can be drawn.

[104] A further question arises as to why an advocate and solicitor would F issue a 'press release'? In the ordinary course of events, advocates and solicitors do not issue such releases unless they are expressly mandated to for and on behalf of the Bar. This too lends further credence to the conclusion that Arun Kasi fully intended that the content of his 'press release' be published in full. This is sufficient to establish mens rea.

G

[105] Even if we apply the higher test set out in *Dhooharika*, on the facts of this case, the more stringent test is met. Arun Kasi is a relatively senior member of the Bar. As such he would, or should, have been fully aware of the impact and consequences of the impugned statements he sought to have published. He H knew or ought to have known that the statements would have the effect of undermining public confidence in the administration of justice. As such, it may be said that his conduct was calculated to impair confidence in the Federal Court and thereby the Judiciary.

I **[106]** Arun Kasi faulted Aliran for editing his press release. If it was true that Aliran had transformed his press release into the two impugned articles by adding words which scandalised the Judiciary, surely he as the author of the press release would have contacted Aliran to protest and demand that they put on record that the contempt should not be attributed to him as the named

author of the two impugned articles. As we have stated above in para 105, Arun Kasi should have known that the two impugned articles had the effect of scandalising the Judiciary. However, there was no evidence before us that he made any attempt to correct the two impugned articles or to object to the adding of contemptuous words into his press release.

Do the impugned statements amount to fair criticism?

[107] Arun Kasi has made unfounded and unambiguous allegations against the Federal Court, but failed to provide a rational basis for authoring these impugned statements. As these allegations are so grave, imputing corruption, it is necessary for him to provide a highly cogent and rational basis for so writing. In this context, we find that a reading of the impugned statements provides no particulars of the need for the report to the MACC, how any such conduct was corrupt, nor any particulars of complicity in the granting of the subject orders. The only conclusion that we can draw in the absence of such cogent particulars is that his allegations cannot amount to fair criticism. We find no material in his affidavits or in the course of his oral testimony to substantiate a plea of fair criticism.

[108] Neither Arun Kasi nor his counsel explained how the foregoing statements amounted to fair criticism. Save for saying that:

(a) the criticism was directed towards the AIAC; and

(b) a reading of his 'press release' together with the appendix would show that he had no intention to scandalise the Judiciary, there was no further explanation.

[109] It is pertinent to bear in mind that the 'press release' and the appendix were not available to the reader. All that was available to the reader were the two articles. And as we have explained earlier, that is the basis on which this hearing proceeded.

[110] Arun Kasi also made the impugned statements without verifying or ascertaining the true facts relating to the *Leap Modulation* expunction proceedings in court. He did not have the notes of proceedings, only the order of the Federal Court. He was asked whether, despite not being apprised of the full facts, he was entitled to write what he did. Both Arun Kasi and his counsel stated that he could.

[111] From the foregoing it follows that as Arun Kasi did not have full knowledge of the proceedings in court, he could not have a highly cogent or rational basis for buttressing his impugned statements. In short, he did not

A concern himself with the underlying accuracy of the statements he chose to have published.

[112] These impugned statements moreover, were not made within the limits of reasonable courtesy and good faith (see the statement in para 44 above taken from the judgment of Salmon LJ in the UK case of *R v Metropolitan Police Commissioner, ex parte Blackburn (No 2)* [1968] 2 WLR 1204 (at p 1207)). Nor were these statements made to encourage the development of the law.

[113] Therefore it is our finding that there has been no rational or cogent basis given for the grave allegations levelled against the Federal Court and thereby the Judiciary. In our view, an objective assessment is that these statements are calculated to undermine the public confidence in the administration of justice, which amounts to scandalising contempt.

[114] It follows from the foregoing that the impugned statements could not have been written in good faith or by way of fair criticism of the *Leap Modulation* case.

The existence of other articles in the media

[115] Learned counsel for Arun Kasi submitted that even prior to the impugned statements in the articles being published, there were numerous other articles directed at the Judiciary, which were calculated to impair or erode public confidence in the administration of justice. Arun Kasi's statements, he submitted, were 'mild' in comparison to these other articles in the media. We have touched on the nature of his submissions at the outset in para 37.

[116] It is clear to our minds that the existence of other articles which are arguably contemptuous in nature does not afford any excuse or defence to Arun Kasi in so far as these committal proceedings are concerned. The matter before us concerns the impugned statements authored by Arun Kasi alone.

[117] It was also contended that as other parties had already made statements which served to erode public confidence, Arun Kasi's statements cannot be said, of themselves, to undermine public confidence in the administration of justice.

[118] This too is untenable because each act of scandalising contempt is punishable in itself. Equally each act of scandalising contempt results in an erosion of public confidence in the Judiciary. Therefore it is incorrect to suggest that Arun Kasi's impugned statements did not or could not have contributed to undermining public confidence in the Judiciary.

Has scandalising contempt been made out beyond reasonable doubt?

[119] We have weighed the competing evidence and submissions as to whether the impugned statements are fair criticism or amount to scandalising contempt. For the reasons stated above, we are satisfied beyond reasonable doubt that Arun Kasi's statements were calculated to erode public confidence in the administration of justice and the Judiciary. We therefore allow/grant the attorney general's application for committal. We find Arun Kasi guilty of contempt.

SENTENCING

[120] In imposing the appropriate sentence, we have carefully considered the submissions of the AG and the mitigation advanced by Arun Kasi, submitted by himself and through his counsel. We note that that he has expressed his regret if his writings are seen to have undermined public confidence in the Judiciary. But at the same time we note that he has not tendered an unreserved apology despite specific query from the court.

[121] In our view this case should serve as a reminder that whilst the members of the public are entitled to express their opinion rationally and engage in discussion about the decision of a court, this has to be done within the limits permitted by law.

[122] As we have said in our judgment, it is important to emphasise that the jurisdiction of the courts does not exist to protect the dignity of individual judges personally. It serves to protect the Judiciary as the third arm of government rather than individual judges. Neither is such jurisdiction to be utilised to restrict honest criticism, which is based on rational grounds, to ascertain the manner in which the court performs its functions. Any such discussion should in any event be conducted bona fide, for and in the public interest.

[123] We are not persuaded that Arun Kasi's articles were authored in the public interest. In the instant case it is clear to us that the authority of the law as administered by the courts was flouted.

[124] What more in the present case as an advocate and solicitor, Arun Kasi as an officer of the court is expected to uphold the dignity of the court.

[125] As an officer of the court he should always act in a responsible manner and in particular he should not breach the law, for if he does so he must face the consequences.

[126] That is why in the present case we hold the view that the sentence must reflect the seriousness of the offence committed by him.

[127] His contemptuous statements against the Federal Court are very serious and tarnish the good name of the Judiciary as a whole. He has undermined the public confidence in the Judiciary, ridiculed, scandalised and offended the dignity, integrity and impartiality of the court.

[128] We have also considered the Bar's submissions not to impose a custodial sentence. However the gravity of the offence committed by Arun Kasi coupled with his refusal to tender an unreserved apology justifies this court taking a serious view of the matter.

[129] In the circumstances we are of the view that the appropriate sentence is a term of imprisonment of 30 days from today and a fine of RM40,000 in default, a further 30 days.

Order accordingly.

Reported by Ashok Kumar